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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1944

No. 207

LENA ROSENMAN AND THE NATIONAL CITY BANK
OF NEW YORK, A CORPORATION, AS EXECUTORS OF THE
LAST WILL AND TESTAMENT OF LOUIS ROSENMAN, DECEASED,
Petitioners,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CLAIMS

REPLY BRIEF FOR PETITIONERS

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There Is a Conflict of Decisions.

Although the Government concedes that *Atlantic Oil Producing Company v. United States*, 35 F. Supp. 766 and *Busser v. United States*, 130 F. (2d) 537 are in conflict, its principal contention in opposing petitioners' appli-

cation for certiorari is that the question involved in those cases "is a question distinct from that in the present case" (Res. Br. p. 10). *But in the court below the Government successfully argued the contrary.* It there asserted that the *Atlantic Oil Producing Co.* case was a controlling authority against us. At page 58 of the Government's brief in the court below, it said:

"However, the question is no longer open in this court. In *Atlantic Oil Producing Company v. United States*, 92 C. Cl. 441, 35 F. Supp. 766, this Court held directly that an advance overpayment of capital stock tax was a payment of tax and that interest was payable by the Government on the refund. The court specifically refused to follow the rule of the *Moses* case, *supra*."

The *Moses* case (*Moses v. U. S.*, 28 F. Supp. 817) was specifically followed and approved by the Circuit Court of Appeals in the *Büsser* case.

In accordance with the Government's contention the court below based its decision in the present case on its prior decision in the *Atlantic Oil Producing* case (R. 15 last par.).

The Amount in Account 9 Was Held to the Credit of the Estate and Not to the Credit of the United States Treasurer.

The statement on page 2 of the Government's brief that the remittance of \$120,000 "was deposited as an internal revenue collection in a so-called suspense account to the credit of the Treasurer of the United States" may prove

misleading. The remittance in question was carried on the books of the Collector in suspense Account 9 *to the credit of the estate* until applied in satisfaction of assessments thereafter made. (R. 8, F. 5, first and last sentences; R. 9, F. 9, first sentence.) The Government at page 9 of its brief attempts to attach significance to the fact that the Collector deposited the cash representing the proceeds of the remittance to the credit of the Treasurer of the United States. That fact, however, is of no importance, as was pointed out by the Government itself in its brief in the *Atlantic Oil Producing Co.* case where it said at page 26:

“The Collector did the only thing he could to indicate that the deposit was not a normal tax payment when he credited it to Suspense Account 9. That action once and for all served to distinguish it from a tax payment. *What happened afterwards in the way of covering it into the Treasury, et cetera, is unimportant.*” (Italics supplied.)

Presumably, all cash received by a Collector of Internal Revenue in connection with taxes, irrespective of whether it is received as a “deposit” or cash bond or as an actual payment of an outstanding tax assessment, is deposited by the Collector in a bank or other legal depository to the credit of the Treasurer of the United States. Manifestly, however, where the cash in question has been received by the Collector as a “deposit” or cash bond and thus placed to the credit of the taxpayer in Account 9, the cash account of the Treasurer of the United States must be correspondingly debited or else the books would not balance. No such debit would occur when the cash is received as a tax payment.

The Commissioner's Letter.

The statement from the Commissioner's letter, quoted by the Government on page 5 of its brief, must be read in the light of the administrative practice and the court decisions (*Busser v. U. S.*, 130 F. 2d 537; *Moses v. U. S.*, 28 F. Supp. 817) pursuant to which the making of a "deposit" is sufficient to avoid interest and penalties. That such is the effect of a deposit seems to be conceded by the Government on page 11 of its brief wherein it states:

"Taxpayers will doubtless continue to make such deposits in order to avoid payment of interest and penalties on taxes due."

(See also Government's brief in *Busser* case quoted at page 9 of petition herein.)

Thus the Commissioner's suggestion, though inartificially worded, was that the executors should make the type of payment which would avoid interest and penalties or, in other words, a "deposit" to be placed in Account 9, and this is precisely how the remittance in question was handled by the Collector.

The foregoing also answers the argument of the Government on page 9 of its brief to the effect that the remittance in question must have been a tax payment and not a deposit because interest was not charged on that portion of the tax deficiency to the payment of which such remittance was eventually applied. This argument entirely disregards the administrative practice of the Treasury, the Government's position before the courts in prior cases and the above decisions of the courts pursuant to which a deposit has been uniformly regarded as avoiding interest and penalties on the tax thereafter assessed, presumably, because during the period of the deposit the Government

has the full use of the money without paying interest therefor.

**Under the Government's Construction of Section 319 (b)
the Filing of a Claim for Refund Might be Barred by
the Statute of Limitations Before the Right to File the
Claim Accrued.**

Section 319 (b) of the Revenue Act of 1926 as amended (which is the statute here involved) deals with the filing of claims for refund in respect of taxes which are "alleged to have been *erroneously* or *illegally* assessed or collected" and requires that such claims for refund be filed "within three years next after the payment of *such* tax", i. e. the tax alleged to have been *erroneously* or *illegally* assessed or collected. (Italics supplied.) Thus the "payment" referred to in the statute is of a tax which has been, or is alleged to have been, *erroneously* or *illegally* assessed or collected.

Section 319 (b) therefore applies only to those claims for refund wherein an essential element of the taxpayer's right or supposed right of recovery is that the tax has been, or is alleged to have been, erroneously or illegally assessed or collected. Unless and until the Commissioner or the Collector has been guilty of some mistake or illegality, actual or alleged, in the assessment or collection of the tax, the taxpayer's right or supposed right of recovery to which Section 319 (b) refers, cannot arise; in other words the taxpayer's "cause of action" cannot accrue.

Section 319 (b) is a statute of limitations and in view of the nature and function of such a statute it seems entirely clear that said section must contemplate that the taxpayer's right or supposed right of refund with which it deals, shall have accrued to the taxpayer prior to the

period of limitation which it fixes; in other words that the taxpayer's "cause of action" shall have accrued prior to such period of limitation.

Now, when a taxpayer makes a remittance to the Collector of Internal Revenue in *advance* of his filing his tax return or in *excess* of the amount of tax shown in the return, there is no basis for the taxpayer's alleging, prior to the filing or the audit of such return, as the case may be, that the Commissioner or Collector has been guilty of a mistake or illegality in the assessment or collection of the tax. The Government seems to concede this on page 11 of its brief.

Such a remittance is made by the taxpayer voluntarily, for his own convenience and benefit, and pending the filing or the audit of his tax return, as the case may be, is being held by the Government with the taxpayer's consent, for the account and to the credit of the taxpayer. Up to that time therefore there would be no basis for the taxpayer to claim that the tax had been erroneously or illegally assessed or collected, because nothing has been done except to comply with his wishes in respect of the remittance.

The Government nevertheless contends that during this same period, the three year limitation provided for in Section 319 (b) is running against the taxpayer. Such a construction of Section 319 (b) would lead to an absurd result and would be contrary to our accepted notion of the nature and function of a statute of limitations, for it might bar the taxpayer's right of recovery *before* such right even came into existence; in other words, it would bar the cause of action before such cause of action even accrued.

Respectfully submitted,

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September, 1944.

